SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1140

THE CREEK NATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Claims

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IN THE

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OCTOBER TERM, 1971

No. ———

THE CREEK NATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Claims

---

The petitioner, the Creek Nation of Indians of the State of Oklahoma, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Claims to review its decision of December 10, 1971, reversing the opinion of the Indian Claims Commission entered September 9, 1970, 23 Ind. Cl. Comm. 484.

OPINIONS BELOW

The opinion of the Court of Claims was entered on December 10, 1971, and is not as yet reported, and is reprinted as Appendix A to this petition. The opinion of the Indian Claims Commission entered September 9, 1970, 23 Ind. Cl. Comm. 484, is reprinted as Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of the Indian Claims Commission Act of Au-

gust 13, 1946, c. 959, § 20(c), 60 Stat. 1049, 1055, as supplemented and amended by Act of September 8, 1960, Pub. L. 86-722, 74 Stat. 821, 829 (25 U.S.C. 70s(c)); and also under 28 U.S.C. § 1255.

The above Indian Claims Commission Act was amended and extended to April 10, 1972 by the Acts of July 24, 1956, c. 679, 70 Stat. 624; June 16, 1961, Pub. L. 87-48, 75 Stat. 92; and April 10, 1967, Pub. L. 90-9, 81 Stat. 11. S. 2408 and H.R. 10390, 92d Cong., 1 Sess., pending before Congress, have for their purpose extending the Indian Claims Commission Act until April 10, 1972.

AUTHORITIES INVOLVED

Sections 10-15 of the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, reprinted as Appendix C to this petition.

Section 1 of the jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, reprinted as Appendix D to this petition.

Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050, reprinted as Appendix E to this petition.

QUESTIONS PRESENTED

1. Whether decisions of the Court of Claims under the special jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, authorizing the Court to adjudicate "legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe", can be applied as res judicata, or to collaterally estop (technical legal defenses). the new causes of action created by Congress for the first time under the broad jurisdictional provisions of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050, authorizing the Commission to hear

and adjudicate (Section 2, Clause 3) "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;" or, in the alternative (Section 2, Clause 5) "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity".

2. Whether, in view of the legislative history of said Indian Claims Commission Act, Congress intended that the United States have the right to advance the technical legal defenses of res judicata or collateral estoppel to defeat "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity" (Sec. 2, Clause 5, Ind. Cl. Comm. Act)—claims based on purely moral principles.

STATEMENT OF THE CASE

The Creek Nation owned in fee simple a large domain in what was then Indian Territory, now a part of the State of Oklahoma. After the advent of the railroads in the early 1870's many white settlers entered and established towns within said Creek domain. Congress changed its policy of isolating the Creek Nation and the other Five Civilized Tribes (Creeks, Seminoles, Cherokees, Choctaws and Chickasaws), and by Sec. 16, Act of March 1, 1893, c. 209, 27 Stat. 612, 645, created what was called the Dawes Commission to negotiate with these tribes for the extinguishment of their tribal titles, and the division of their tribal domains into individual allotments to enrolled members thereof, the disposition of their surplus lands, and the distribution of the proceeds per capita to the members of said tribes. The tribes were reluctant to agree to such a drastic change in their way of life, and resisted this change. Congress became impatient with the delay in the negotiations and on June 28, 1898, c. 517,

30 Stat. 495, passed what is known as the Curtis Act, directing that the United States enroll the members of these tribes, appraise and allot their tribally owned lands to the individual members thereof, segregate and dispose of the townsites, dispose of the surplus lands, and divide the proceeds of said sales among the enrolled members of said tribes.

This Act brought the tribes to negotiate with the United States for the accomplishment of such purposes, and the Original Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861, was executed with the Creek Nation. Thus under the Curtis Act and the Creek Agreement, United States took over full administrative control over the property and affairs of this tribe to carry out the new policy of the United States toward them. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553; *United States* v. *Creek Nation*, 295 U.S. 103, 109-110.

In 1930 the Creek Nation filed suit under the jurisdictional Act of May 24, 1924, 43 Stat. 139, to recover the fair market value of the townsites within the Creek domain, claiming that fraud was committed by the townsite commissions appointed by the Secretary of the Interior in carrying out the provisions of Sections 10-15 of the Creek Agreement (31 Stat. 861, 864-866). Under said Act of May 24, 1924 the Creek Nation was limited to presenting claims arising and growing out of the written terms of the Creek Agreement, and could not present a claim based upon revision of the written terms of said agreement. *Creek Nation* v. *United States*, 63 Ct. Cl. 270 (1927).

The Court of Claims in *Creek Nation* v. *United States*, 97 Ct. Cl. 602 (1942), denied recovery, and certiorari was denied, 318 U.S. 787 (1943). The Court stated the single issue in the case, as follows (p. 610):

> "The question for our determination, therefore, is whether or not these townsite commissions were guilty

of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites.

"* * * The Creek Agreement provided for the appraisal of these lots by the commission, and not by us. It was expressly provided:

> * * * The agreement of any two members of the commission as to the true value of any lot *shall constitute a determination thereof*, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary [Italics ours]".

On the sing'e issue as thus defined the Court concluded (p. 611):

> "Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either. * * *"

The Court thus did not determine the fair market value of the Creek townsites, leaving this issue an open question. (97 Ct. Cl. 602, is reprinted as Appendix F).

Claim for the fair market value of the Creek townsites was again filed under the broad jurisdictional provisions of the Indian Claims Commission Act, the Creek Nation invoking the relief provided under the new causes of action created for the first time, and made available to the Creek Nation for the first time under Section 2, Clause 3 of said Act, authorizing revision of the written terms of Sections 10-15 of the Creek Agreement governing the disposition of Creek townsites by the United States, on the ground of unconscionable consideration, or other equitable grounds; or, in the alternative, claiming relief under Section 2, Clause 5, authorizing relief "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity"—a moral claim.

Essential to a determination by the Indian Claims Commission under the jurisdictional provisions of revision for unconscionable consideration, and under the alternate relief sought under the fair and honorable dealings provision, is a determination of fair market value of the Creek townsites, in order to check said value with the amounts the Creek Nation actually received from the disposals made by the Creek townsite commissions. If the proof, *by a preponderance of the evidence*, showed that the amounts received by the Creek Nation were less than 50% of the fair market value of said townsites, petitioner would be entitled to recover on the ground of unconscionable consideration, or under fair and honorable dealings principles.

The Creek Nation sought revision of Sections 10-15 of the Creek Agreement in several respects, but particularly revision of that part of Section 10 which reads as follows:

> "* * * The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary."

It was this portion of said Section 10 that permitted said townsite commissions to avoid a determination of fair market value. The record shows that the townsite commissioners fixed an arbitrary value for the townsites without considering the elements which make up fair market value, and the agreement of any two of the commissioners thus fixed said values. The Government's own investigator, William D. Foulke, Special Inspector for the Department of the Interior, in a detailed report, dated December 16, 1906 (Defendant's Exhibit 6), reviewed the appraisals made by the townsite commissioners, and stated, with respect to the townsite of Muskogee, that the commissioners appraised this townsite at an extremely

low figure; that an important element of fair market value—prices paid for occupancy rights to townlots—was completely ignored by the townsite commissions in appraising Creek townsites. Inspector Foulke pointed out (at p. 29 of his report) that the United States Inspector for Indian Territory, in transmitting the appraisal schedule of Muskogee townsite to the Secretary of the Interior on June 21, 1900 for approval, advised the Secretary that:

> "* * * in my judgment the appraisals of business lots are fixed at extremely low figures in some instances, considering at what prices such property has been and is held for occupancy rights only, * * *".

The Secretary of the Interior, nevertheless, approved said appraisal without an investigation into the low appraisals.

Inspector Foulke commented (pp. 29-30 of his report):

> "It would thus appear that the appraisement was a purely arbitrary one proceeding from the inner consciousness of the commissioners, and that it had no reference whatever to actual value. They might as well have made it one mill or fifty dollars."
>
> * * * *
>
> "While it is utterly impossible now to state what was the real value of the town of Muskogee, when the appraisement was made, I am convinced that the average appraisement was less than one-third of the actual market value of the land at the time, while in the case of business property it was often less than 10% of the actual market value."

In deciding the issues to be determined in this case the Indian Claims Commission, in its "Opinion on motions to determine issues", dated September 9, 1970 (Appendix B), pointed out the difference between the prior litigation in 97 Ct. Cl. 602 (1942), and the later proceedings before the Commission, as follows (23 Ind. Cl. Comm. 484, 487-488):

"The difference in the ultimate issue to be determined in this case and the prior case is apparent. There the Court was concerned with whether the evidence of higher true market value constituted proof that the appraisals must have been arrived at through fraud or gross error. For the purpose of this claim, the Commission will be required to weigh the evidence and determine the true market value for comparison with the consideration, but will not be concerned with whether the value evidence establishes fraud or gross error on the part of the appraisers. Such a difference in the controlling factual issue would prevent the application of collateral estoppel to exclude the entire issue of fair market value of townlots."

The Commission's order denying defendant's motion for rehearing was overruled on November 25, 1970, and the Government appealed from this order to the Court of Claims.

In Appeal No. 5-71, decided December 10, 1971, the Court of Claims reversed the decision of the Indian Claims Commission, holding that "appellee's right to recover on the claim presented in this appeal is foreclosed by the doctrine of collateral estoppel." (See Appendix A).

Petitioner believes that this last holding of the Court of Claims is erroneous because it prevents petitioner from having its claim adjudicated under the new jurisdictional provisions of the Indian Claims Commission Act (Section 2, Clauses 3 and 5 of the Indian Claims Commission Act), created for the first time under said Act, and which were not available to petitioner under the prior jurisdictional act of May 24, 1924. Further, this holding of the Court assumes that the Court in the prior case actually determined the fair market value of the Creek townsites, which it did not.

REASONS FOR GRANTING THE WRIT

1. The December 10, 1971 decision of the Court of Claims conflicts with the prior decision of that Court in *Creek Nation* v. *United States*, 168 Ct. Cls. 487 (1964), deciding the very issues herein presented. (168 Ct. Cls. 487 is reprinted as Appendix G).

In *Creek Nation* v. *United States*, 168 Ct. Cl. 487 (1964), the Court carefully analyzed the basic differences between the prior jurisdictional act of May 24, 1924, and the broad jurisdictional provisions of the Indian Claims Commission Act; citing *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), which distinguishes between res judicata and collateral estoppel, and holding that neither res judicata nor collateral estoppel applies to the new causes of action created for the first time under Section 2, Clauses 3 and 5 of the Indian Claims Commission Act. The Court cited and quoted from *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876), relative to collateral estoppel, as follows (168 Ct. Cl. 490-491):

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The Commission in its decision of September 9, 1970, quoted supra, clearly pointed out the distinction between the issues presented in 97 Ct. Cl. 602 (1942), and the issues presented in the claim under the Indian Claims Commission Act. As the Commission pointed out in the

prior litigation the Court required the strictest proof to convince it that fraud was practiced by the Creek townsite commissions, and for that reason did not determine the fair market value of the Creek townsites; whereas, the proof of fair market value under the revision jurisdiction of the Commission and under the fair and honorable dealings jurisdiction, requires a preponderance of the evidence.

In the interests of justice and to clear up the confusion now existing this Court should resolve the conflict between the above two decisions of the Court of Claims.

2. The decision of the Court of Claims is contrary to the legislative history of the Indian Claims Commission Act, relative to claims based upon "fair and honorable dealings".

The legislative history of the Indian Claims Commission Act shows that Congress did not intend that the United States should apply the technical *legal defenses* of res judicata and collateral estoppel to claims based upon fair and honorable dealings not recognized by any existing rules of law or equity—claims based upon purely moral issues.

In considering the defenses available to the United States in claims based upon fair and honorable dealings under the Indian Claims Commission Act, Mr. Frank Chambers, representing the Department of Justice, appeared before the Senate Committee on Indian Affairs on July 13, 1946, and assured the Committee that no *legal defenses* were intended to be advanced to defeat claims based upon fair and honorable dealings. The testimony given is as follows (Hearings on H. R. 4497, 79th Congress, 2d Session, before the Senate Committee on Indian Affairs, on July 13, 1946, pp. 59-60):

> "The Chairman. Let me ask you, Mr. Chambers: I understand you to say that this language in lines 13 and 14, 'but all other defenses shall be available

to the United States,' was not intended to set up a legal defense against an equitable claim.

"Mr. Chambers. Against a moral claim. I would like to distinguish between equitable and moral, because of the possibility that 'equitable' might relate to a claim in equity, say, under the Constitution; but against a moral claim my idea is that no legal defense would be good.

"The Chairman. So that no legal defense would be recognized against a claim based upon fair and honorable dealings that are not recognized by any existing rules of law or equity?

"Mr. Chambers. That is correct."

Accordingly, Senate Report No. 1715, 79th Cong., 2 Session, dated July 15, 1946, p. 6, stated in adopting this amendment proposed by the Department of Justice:

"It is understood that the bill as it passed the House was intended to permit all defenses to the Government except the plea of statute of limitations or laches, and as amended this is made clear in the bill. These provisions are not intended, however, to authorize the raising of legal defenses in cases based on standards of fair and honorable dealings, referred to in clause (3) of section 2 of the bill." (Clause 3 was later changed to Clause 5 of Section 2 of the Indian Claims Commission Act).

The Conference Report of July 27, 1946 (H. Rept. No. 2693, 79th Congress, 2d Session, p. 6) on H. R. 4497, further plainly stated in pertinent part:

"* * * As stated in the Senate report, this amendment does not permit the raising of legal defenses in cases based on standards of 'fair and honorable dealings,' for the bill expressly authorizes suit on such claims. * * *"

Clearly the Court's decision of December 10, 1971, upholding the technical legal defense of collateral estoppel

is contra to the intent of Congress in passing Section 2, Clause 5 of the Indian Claims Commission Act.

CONCLUSION

Therefore, petitioner hereby requests that this Court issue a writ of certiorari to the United States Court of Claims to correct the errors above enumerated in that Court's decision of December 10, 1971, so that petitioner, and others so situated, can have their day in Court under the new jurisdictional provisions of the Indian Claims Commission Act, and made available to them for the first time by that Act.

Respectfully submitted,

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Washington, D.C. 20036
Attorney for Petitioner

March 8, 1972

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 5-71

Ind. Cl. Comm. Docket No. 273

20 Ind. Cl. Comm. 484

(Decided December 10, 1971)

THE UNITED STATES

v.

THE CREEK NATION

Paul M. Niebell, attorney of record, for appellee.

Ralph A. Barney, with whom was *Assistant Attorney General Shiro Kashiwa*, for appellant. *Craig Decker*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

PER CURIAM: In this appeal, the United States contends that the Indian Claims Commission erred as a matter of law in failing to hold that the doctrines of *res judicata*

and/or collateral estoppel effectively bar the appellee's right to have the Commission redetermine the fair market value of certain Creek town lots. The appellee filed its claim with the Indian Claims Commission under the Act of August 13, 1946, seeking to revise the Creek Agreement of March 1, 1901 (31 Stat. 861), so as to recover the true value of certain Creek lots in the State of Oklahoma, which were sold to settlers. In its September 9, 1970 "Opinion on Motions to Determine Issues," the Commission noted that the facts upon which appellee's claim is founded were at issue in *Creek Nation* v. *United States*, 97 Ct. Cl. 602 (1942), *cert. denied*, 318 U.S. 787 (1943). In denying appellant's pleas of *res judicata* and collateral estoppel, the Commission was of the opinion that our prior decision in this case was concerned with whether the evidence of higher true market value constituted proof that the appraisals must have been arrived at through fraud or gross error. With respect to the claim involved in this appeal, the Commission decided that it would be required to determine the true market value of the lots without regard to whether the evidence would establish fraud or gross error on the part of the appraisers.

We reverse. We think it is clear that the Commission misinterpreted the prior decision of this court and that the doctrine of collateral estoppel bars appellee from relitigating the issue of the fair market value of the town lots.

Our decision of June 1, 1942, 97 Ct. Cl. 602, was based upon a special jurisdictional act which conferred jurisdiction on the court to

> * * * hear, examine, and adjudicate and render judgment on any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States * * *. *Id.* at 603.

In describing the issues to be decided, the court's opinion in that case stated:

> The plaintiff sues the defendant for the difference between the sale price of its town lots, which were sold by a commission appointed by the Secretary of the Interior, and what it alleges was the "true value" thereof. *Id.* at 607.
>
> • • • •
>
> It is alleged that these appraisals were arbitrary, fictitious, unreasonable, and made without any attempt to fix true values of the lots, and were far below the true values thereof. This, it is alleged, constituted a taking of plaintiff's property by the defendant, for which it is required by the Fifth Amendment of the Constitution to pay just compensation; or, if this be not true, it is alleged that the appraisals and their subsequent approval by the Secretary of the Interior were a violation of the Creek Agreement, for which the defendant is liable to respond to plaintiff for the loss suffered thereby. *Id.* at 608-609.

Thus, there is no doubt that the former action and the claim now before us were brought for identical purposes, namely, to show that the lots were sold for less than their true value and to recover the difference between the sale prices and the "true" or "fair market" value of the lots.

In the previous *Creek* case, 97 Ct. Cl. 602, the court made the following findings of fact:

> 4. • • •
>
> The commissioners so appointed were qualified to discharge the duties for which they were appointed. *Id.* at 605.
>
> • • • • •
>
> 7. The lots in the town of Wagoner were appraised in 1901, and all the rest in 1902, except the town of Boynton, which was appraised in 1905. Prior to the time the appraisals were made no lots within the Creek Domain had ever been sold, and no market

values had been established. The commissioners in making the appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on the value of lots. In making the appraisals the commissioners exercised their best judgment of the value of each of the lots. In each instance the appraisals were unanimous, and in each instance the Indian Inspector and the Commissioner of Indian Affairs recommended that they be approved, and in each instance they were approved by the Secretary of the Interior.

After the appraisals had been made, deeds to the lots were executed by the Principal Chief of the Creek Nation. At the time these deeds were executed no one complained that the appraisals were too low. *Id.* at 606.

8. • • •

Later, on October 19, 1906, the Creek Nation presented a memorial to Congress complaining of wrongful scheduling of the lots, but in this memorial no complaint was made that they had been appraised too low. • • • *Id.* at 606.

9. • • •

There is no proof in the record from which can be determined the true values of the lots at the time they were appraised other than the appraisals themselves. The proof does not show that the lots were not appraised at their true values. • • • *Id.* at 607.

In addition to the findings recited above, the court in that case also decided the issue as to whether the townsite commissioners had been guilty of fraud or gross negligence in surveying and appraising the lots. With respect to this issue, the court found as follows:

Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations.

> The proof offered by the plaintiff fails to convince us of either. *Id.* at 611.

In the light of these findings and on the basis of the legal principles which we discussed in *Creek Nation* v. *United States*, 168 Ct. Cl. 512 (1964), we must conclude that the appellee's right to recover on the claim presented in this appeal is foreclosed by the doctrine of collateral estoppel.

The appellee attempts to avoid the effect of the findings of fact made by the court on the ground that when the earlier case was decided, we had no authority to determine a claim based on fair and honorable dealings or to consider an agreement as if revised on the ground of unconscionable consideration. In its decision of September 9, 1970, the Commission apparently ignored these contentions for the obvious reason that they have no relevance to the determination of market value which the Commission proposes to make. Section 10 of the Creek Agreement (31 Stat. 861), the pertinent section, merely provides for the appointment of a townsite commission to appraise and sell the lots for the benefit of the tribe. It further provides that an agreement of two members as to the true value of the lots shall constitute a determination thereof. The appellee has not suggested how an attempt to revise the agreement on the ground of "unconscionable consideration" would affect the finding that the proof in the prior case did not show that the lots were not appraised at their true value. Even if there were any conceivable reason for revising the Creek agreement with respect to the lots, it would not aid the appellee. In its 1942 decision, this court found that the proof failed to show gross error in the valuation of the lots. *Osage Nation* v. *United States*, 119 Ct. Cl. 592, 97 F. Supp. 381 (1951), *cert. denied*, 342 U.S. 896.

Any evidence that appellee might present under the label of "lack of fair and honorable dealings" would be equally immaterial and unavailing. The only reason for

the admission of such evidence would be to show that the lots were not sold at their true value. That fact has been finally and conclusively decided against the appellee in the prior suit.

Reversed.[1]

[1] The "half price" issue, which was also considered in the Commission's decision of September 9, 1970, is not before us, and we intimate no decision on it.

APPENDIX B

23 Ind. Cl. Comm. 484

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 273

THE CREEK NATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: September 9, 1970

Appearances:

Paul M. Niebell, Attorney for the Plaintiff.

Craig A. Decker and Jonathan U. Burdick, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION ON MOTIONS TO DETERMINE ISSUES

Yarborough, Commissioner, delivered the Opinion of the Commission.

This suit was brought to recover whatever sum might be due if Sections 10 through 15 of the Creek Agreement proclaimed on June 28, 1901 (31 Stat. 861), were revised on the ground of unconscionable consideration or other equitable grounds (clause 3 of section 2 of the Indian Claims Commission Act of 1946, 25 U.S.C. 70a(3)) or, alternatively, to recover any balance which might be due

the plaintiff as a consequence of the defendant's failure in negotiating the cited Creek Agreement to adhere to the criterion of fair and honorable dealings (clause 5 of section 2 of the Act).

The facts upon which this suit is founded were at issue in the Court of Claims under a special jurisdictional statute in the case of *Creek Nation* v. *United States*, 97 Ct. Cl. 602 (1942), *cert. denied*, 318 U.S. 787 (1943). Beginning in 1902, the defendant appointed three-man commissions to appraise Creek-owned townlots prior to their sale to the public. These townlots were located in a number of townsites in what is now the State of Oklahoma, and their proceeds were to be deposited to the plaintiff's credit. After appraisal, a majority of the townlots were sold at half their appraised value to settlers who, holding the property, were entitled to buy under Section 11, 12 or 13 of the Creek Agreement (*supra*). and the remainder were auctioned under Section 14 (*id.*). While a majority of the lots were claimed and sold under the half-value provisions, a number which had been improperly scheduled for half-value selection were, through litigation initiated by the defendant, retrieved for subsequent auction.

By a pretrial statement filed on February 19, 1970, as refined by a motion for an order determining the issues to be tried, filed on June 16, 1970, the defendant sought to establish the issue of liability and limit the quantum of damages if liability were found to exist. The plaintiff responded with similarly-titled pleadings on May 25, 1970, and June 18, 1970. Respecting the issues, the parties agree that if the half-price conditions were imposed upon the plaintiff improperly, i.e., without conscionable consideration, inequitably, or as a consequence of unfair or dishonorable dealings, liability exists to the extent of the remaining one-half of the appraised value of each of the townlots selected under Section 11, or 12 or 13 of the Creek Agreement (*supra*).

The defendant concedes that the assertion of this claim is not barred by *res judicata* as it presents a claim not within the jurisdiction of the Court of Claims in the prior litigation. *Creek Nation* v. *United States*; 168 Ct. Cl. 483 (1964). As it is apparently not contested that the fair market value of the townlots was at least the appraised value, payment of only 50% of their value as consideration likely will be held unconscionable upon the production of appropriate proof. See *Nez Perce Tribe* v. *United States*, 176 Ct. Cl. 815 (1966), at 826, 827, *cert. denied*, 386 U.S. 984 (1967).

The plaintiff also urges that the appraisal commissions in fact failed to appraise the townlots as high as their true market value, and that therefore this Commission ought to value each of the appraised townlots and award the plaintiff the difference. The defendant contends that the principle of collateral estoppel bars relitigation of this factual issue which was raised in the prior Creek case (97 Ct. Cl. 602).[1]

The prior litigation in the Court of Claims presented this single issue (*Creek Nation*, *supra*, at 610):

> . . . whether or not these townsite commissions were guilty of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites.

On that single issue, the Court concluded that (*id.*, at 611):

> Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either.

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[1] The defendant further contends that the parties' agreement on issues, as expressed in a previous hearing, also bars litigation of this point (Tr., 21, 22). However, we decline to hold that a party's statement in oral argument will effect a waiver of a claim stated in the pleadings under the circumstances of this case.

The defendant contends that because the underlying factual basis is the same, i.e., whether the townlots were in fact appraised at their true market value, the claim or cause of action is the same and is consequently barred of relitigation by the principle of collateral estoppel, a defense available to the defendant under appropriate circumstances. *Creek Nation* v. *United States*, 168 Ct. Cl. 512 (1964).

We agree that the parties are collaterally estopped from relitigating any fact which (1) was determined in the litigation styled *Creek Nation* v. *United States*, 97 Ct. Cl. 602 (1942), and (2) was essential to that decision. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1947).

The difference in the ultimate issue to be determined in this case and the prior case is apparent. There the Court was concerned with whether the evidence of higher true market value constituted proof that the appraisals must have been arrived at through fraud or gross error. For the purpose of this claim, the Commission will be required to weigh the evidence and determine the true market value for comparison with the consideration, but will not be concerned with whether the value evidence establishes fraud or gross error on the part of the appraisers. Such a difference in the controlling factual issue would prevent the application of collateral estoppel to exclude the entire issue of fair market value of townlots.

In view of the foregoing discussion, it is apparent that these must be the two issues to be next litigated in the case at bar:

1. Whether the half-price conditions were imposed by the defendant upon the plaintiff without conscionable consideration, or otherwise inequitably, or without adherence to the principle of fair and honorable dealings.

2. The fair market value of each of the selected townlots appraised by the several appraisal commissions.

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH, Commissioner

We Concur:

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL, Chairman

/s/ John T. Vance
JOHN T. VANCE, Commissioner

/s/ Margaret H. Pierce
MARGARET H. PIERCE, Commissioner

/s/ Brantley Blue
BRANTLEY BLUE, Commissioner

APPENDIX C

Sections 10-15 of the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861:

Town Sites.

10. All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised under the provisions of an Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May thirty-first, nineteen hundred, which said provisions are as follows:

"That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks, the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

"Hereafter the work of the respective town-site commissions provided for the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the Act of June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior and not before.

"The Secretary of the Interior may in his discretion appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

"Where in his judgment the public interests will be thereby sub-served, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation a separate town-site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory.'

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

"As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing Act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

"The Secretary of the Interior may, for good cause, remove any member of any townsite commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

"It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such townsite limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the exterior limits of all townsites shall be designated and fixed at the earliest practi-

cable time under rules and regulations prescribed by the Secretary of the Interior.

"Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time. Such townsites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other townsites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided*, That hereafter the Secretary of the Interior may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a townsite commissioner for any town or to fill any vacancy caused by the neglect or refusal of the townsite commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion appoint a commissioner to fill the vacancy thus created."

11. Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised value thereof, but if he shall fail within sixty days to purchase such lot and make the first payment thereon, as herein provided, the lot and improvements shall be sold

at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the purchase price to the owner of the improvements, less the appraised value of the lot.

12. Any person having the right of occupancy of a residence or business lot or both in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

13. Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

14. All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been divided at two-thirds of their appraised value.

15. When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty

days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money in three equal annual installments, without interest.

Any person who may purchase an unimproved lot shall proceed to make payment for same in such time and manner as herein provided for the payment of sums due on improved lots, and if in any case any amount be not paid when due, it shall thereafter bear interest at the rate of ten per centum per annum until paid. The purchaser may in any case at any time make full payment for any town lot.

APPENDIX D

Act of May 24, 1924, c. 181, 43 Stat. 139:

Sec. 1. * * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: * * *.

APPENDIX E

Indian Claims Commission Act, August 13, 1946, c. 959, 60 Stat. 1049, 1050, 1054:

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * * (25 U. S. C. 70a).

Sec. 20(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288, as amended. (25 U. S. C. 70s(c)).

APPENDIX F

97 Ct. Cl. 602

THE CREEK NATION

v.

THE UNITED STATES

[No. L-137. Decided June 1, 1942. Plaintiff's motion for new trial overruled October 5, 1942] *

On the Proofs

Indian claims; liability of United States for fraud or gross negligence of commission appointed under the Curtis Act and the "Original Creek Agreement" to appraise and sell town lots.—Where, under the Curtis Act (30 Stat. 495), and subsequently under the "Original Creek Agreement" (31 Stat. 861), commissions were appointed or approved by the Secretary of the Interior to survey, plat, schedule, and appraise town lots within the Creek Domain, it was *held* defendant would be liable if these commissions in the surveying, platting, scheduling, and appraising of the lots had been guilty of fraud or gross negligence. *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97; *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474.

* Plaintiff's petition for certiorari denied, *post*, page 736.

Same; appraisals made by commission appointed to sell town lots conclusive in absence of fraud or gross mistake; character of evidence necessary to establish fraud.—It was also *held* that the correctness of the findings of these commissions was to be presumed, and that fraud or gross mistake could only be established by clear and convincing evidence, especially in view of the long lapse of time since the appraisals in the bringing of this suit.

Same; disparity between appraisals and sale price or assessment for taxation.—Mere disparity between appraisal and subsequent sale price or amount of subsequent assessment not sufficient to show fraud or gross mistake, especially where conditions are not shown to have been the same.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Mr. C. Maurice Weidemeyer* was on the brief.

Mr. Clifford R. Stearns, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Messrs. Raymond T. Nagle* and *Wilfred Hearn* were on the briefs.

The court made special findings of fact as follows:

1. This suit is brought under a special jurisdictional act, approved May 24, 1924 (43 Stat. 139), which confers jurisdiction on this court "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States * * *."

This Act was later amended by a joint resolution (44 Stat. 568) permitting plaintiff to bring separate suits on

one or more causes of action, and by the Act of February 19, 1929 (45 Stat. 1229), and by the Act of August 16, 1937 (50 Stat. 650), not material to the issues.

2. Prior to the passage of the Act of June 28, 1898 (30 Stat. 495), known as the Curtis Act, all land in the Creek Domain, in what is now the State of Oklahoma, was owned by the tribe in common, and while an individual Indian might have had the exclusive right to use and occupy a particular area, and might have conveyed this right, he could not dispose of the fee.

A number of towns had grown up within the territory, and lots in these towns were occupied by white persons under various sorts of conveyances from the individual Indians, none of whom undertook to convey a greater right than the individual Indian himself had, which was the exclusive right to use and occupy the land conveyed. On these lots considerable improvements had been made.

3. The Curtis Act provided for the allotment of certain portions of the Creek Domain to the individual members of the tribe, and for the sale of the remainder. Among the lands to be sold were the lots in the towns which had grown up and in such other towns as might be established: It provided for commissions to appraise and sell these lots. The occupant of a lot who had made permanent improvements thereon was entitled to purchase the same at one-half of its appraised value. The vacant lots and those on which permanent improvements had not been made were required to be sold at public auction.

Said commissions were required to be composed of one member of the tribe, to be appointed by the executive of the tribe, one member to be appointed by the Secretary of the Interior, and one member to be selected by the town. Commissions were appointed for the towns of Muskogee and Wagoner, which proceeded to appraise the lots in these two towns.

Before the lots in these two towns were sold the Creek Nation and the United States entered into an agreement known as the Original Creek Agreement, which was ratified by Congress and approved by the President on March 1, 1901 (31 Stat. 861), and which was ratified by the Creek Nation on May 25, 1901, and proclaimed by the President on June 28, 1901. This Act provided that the townsites be surveyed and platted, and that the lots within them be appraised at their true values, excluding improvements. It provided for a commission whose duty it should be to survey and plat, appraise, and sell the town lots. This commission was to be appointed by the Secretary of the Interior. It was provided that it should be composed of three men, one of whom was required to be a citizen of the tribe, to be nominated by the principal chief of the tribe. Under this agreement, as under the Curtis Act, an occupant of a lot who had made permanent improvements thereon was entitled to the prior right to purchase it at a certain portion of its appraised value. The vacant lots and those on which permanent improvements had not been made were required to be sold at public auction.

4. Upon ratification of this agreement, the Secretary of the Interior appointed the same persons to act as townsite commissioners for the towns of Muskogee and Wagoner as had been appointed previously under the Curtis Act, and he later appointed other commissioners for the other towns within the territory. The towns in which lots were sold were as follows:

Beggs
Bixby
Boynton
Bristow
Checotah
Coweta
Eufaula
Henryetta
Holdenville
Mounds
Muskogee
Okmulgee
Red Fork
Sapulpa
Tulsa
Wagoner
Wetumka

The commissioners so appointed were qualified to discharge the duties for which they were appointed.

5. Section 10 of the Creek Agreement, above referred to, provided in part as follows:

> * * * Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary.

6. The commissions for the towns of Muskogee and Wagoner adopted the appraisals made under the authority of the Curtis Act a year previously. In transmitting the report of this commission previously made under the Curtis Act, the Indian Inspector for the Five Civilized Tribes stated:

> In my judgment, the appraisals of business lots are fixed at an extremely low figure in some instances, considering what prices such property as has been and is held for occupancy rights only.

It was nevertheless forwarded with his approval, and it was also aproved by the Commissioner of Indian Affairs on June 23, 1900, and by the Secretary of the Interior on June 28, 1900. When resubmitted after the Creek Agreement on August 3, 1901, it was again approved by the Secretary on August 10, 1901.

7. The lots in the town of Wagoner were appraised in 1901, and all the rest in 1902, except the town of Boynton, which was appraised in 1905. Prior to the time the appraisals were made no lots within the Creek Domain had ever been sold, and no market values had been established.

The commissioners in making the appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on the value of lots. In making the appraisals the commissioners exercised their best judgment of the value of each of the lots. In each instance the appraisals were unanimous, and in each instance the Indian Inspector and the Commissioner of Indian Affairs recommended that they be approved, and in each instance they were approved by the Secretary of the Interior.

After the appraisals had been made, deeds to the lots were executed by the Principal Chief of the Creek Nation. At the time these deeds were executed no one complained that the appraisals were too low.

8. On October 12, 1904, the Creek Nation passed an Act complaining of wrongful scheduling of the lots, by which is meant making a schedule of the occupants of the lots who had made permanent improvements thereon, and who were, therefore, entitled under the Act to purchase the same. In this Act it was requested that an investigation be made of the scheduling and appraisal of the lots.

Later, on October 19, 1906, the Creek Nation presented a memorial to Congress complaining of wrongful scheduling of the lots, but in this memorial no complaint was made that they had been appraised too low. As a result of this memorial, an Act was passed (34 Stat. 137, 144) authorizing the filing of suits to remedy the wrongs complained of. Two hundred thirty-one such suits were filed based upon wrongful scheduling of the lots.

9. The appraisals of the entire lots in a number of the towns were considerably lower than the aggregate amount at which the town authorities assessed these lots for taxation in the following year, but it is not shown how much the aggregate of the assessment for taxation includes assessment on improvements, and how much on

the lots, nor is it shown that conditions were the same at the time of appraisal and at the time of assessment for taxation.

In other instances, the appraisal of vacant lots by the townsite commissions were considerably less, one-half or more less, than the price at which these lots sold at public auction a year or so later, but the proof does not show that the conditions were the same at the time the property was appraised and at the time it was sold at public auction.

There is no proof in the record from which can be determined the true values of the lots at the time they were appraised other than the appraisals themselves. The proof does not show that the lots were not appraised at their true values. There is not sufficient proof in the record from which the true values of the lots as of the date of the appraisals can be determined by us.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the difference between the sale price of its own lots, which were sold by a commission appointed by the Secretary of the Interior, and what it alleges was the "true value" thereof.

Prior to the passage of the Curtis Act, approved June 28, 1898 (30 Stat. 495), all land in the Creek Domain was owned by the tribe in common; but that Act provided for the allotment of certain portions of the land to the individual members of the tribe and for the sale of the remainder. Among the lands to be sold were lots in the towns within its territory. Section 15 of the Act provided for a commission to appraise and sell these lots. It was provided that the commission should be composed of one member of the tribe in question, to be appointed by the executive of the tribe, one member to be appointed by

the Secretary of the Interior, and one member to be selected by the town.

A commission for the town of Muskogee was appointed pursuant to this Act, consisting of Dwight W. Tuttle, John Quincy Adams, and Benjamin F. Marshall, the latter being the appointee of the executive of the tribe. A similar commission was appointed for the town of Wagoner. In due course they proceeded to appraise the lots in these two towns.

Before the lots were sold the plaintiff and the defendant entered into an agreement known as the Original Creek Agreement, ratified by Congress and approved by the President on March 1, 1901 (31 Stat. 861), and ratified by the Creek Nation, on May 25, 1901, and proclaimed by the President on June 28, 1901. This agreement also provided for the sale of lots within the towns. Its provisions for the appointment of commissions were similar to those of the Curtis Act, except that they provided for their appointment by the Secretary of the Interior, one of whom was required to be a citizen of the tribe, to be nominated by the Principal Chief of the tribe.

Upon the passage of this Act the Secretary of the Interior appointed the same commissions for the towns of Muskogee and Wagoner previously appointed under the Curtis Act, and he later appointed commissioners for the other towns within the Creek territory.

Upon the reappointment of the commissions for Muskogee and Wagoner they adopted their appraisals formerly made under the Curtis Act, and in due course reported them to the Secretary of the Interior, and they were approved by him. The commissioners appointed for the other Creek townsites made their appraisals in due course and reported them to the Secretary of the Interior, and their appraisals were approved by him.

It is alleged that these appraisals were arbitrary, fictitious, unreasonable, and made without any attempt to

fix true values of the lots, and were far below the true values thereof. This, it is alleged, constituted a taking of plaintiff's property by the defendant, for which it is required by the Fifth Amendment of the Constitution to pay just compensation; or, if this be not true, it is alleged that the appraisals and their subsequent approval by the Secretary of the Interior were a violation of the Creek Agreement, for which the defendant is liable to respond to plaintiff for the loss suffered thereby.

The Agreement required the Secretary of the Interior to appoint townsite commissions, and required the commissions to appraise and sell the town lots under his supervision. It is necessarily to be implied that the Secretary was obligated to act in good faith in the appointment of these commissioners, and that the commissioners were obligated to act in good faith in appraising and selling the lots, and if either the Secretary or the commissioners in the discharge of their duties perpetrated a fraud on plaintiff's rights, or were guilty of gross negligence in the discharge of their duties, the defendant is liable in damages therefor. See *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97; *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474.

In *Ross* v. *Stewart*, *supra*, the court said of the action of these townsite commissions:

> All reasonable presumptions must be indulged in support of the action of the officers to whom the law entrusted the proceedings • • •.

In *Johnson* v. *Riddle*, *supra*, in which was attacked the validity of the act of the townsite commission in awarding the right to purchase a lot to one of two rival claimants, the Supreme Court said:

> • • • The Supreme Court of Oklahoma therefore was correct in holding that the findings of the Inspector respecting matters of fact, affirmed on final appeal by the Secretary, were binding upon the courts,

> in the absence of gross mistake or fraud (neither of which is here present), and that the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the preferential right of purchase, and ultimately issuing the patent, to the wrong party.

The question for our determination, therefore, is whether or not these townsite commissions were guilty of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites.

It must be said at the outset that it would take the most clear and convincing evidence to induce us, especially at this time, forty years later, to set aside the findings of these commissioners, and ourselves undertake to fix the value of these lots. The Creek Agreement provided for the appraisal of these lots by the commission, and not by us. It was expressly provided:

> • • • The agreement of any two members of the commission as to the true value of any lot *shall constitute a determination thereof*, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary. [Italics ours.]

The commissions for Muskogee and Wagoner appointed under the Curtis Act were composed of a representative of the town, a member of the tribe, and an appointee of the Secretary of the Interior. These commissions were continued under the Creek Agreement. On the other commissions there was a representative of the tribe. All the representatives of the tribe agreed to the appraisals; the appraisals were unanimous. In addition, they were approved, first, by the Inspector for the Five Civilized Tribes, then by the Commissioner of Indian Affairs, and finally by the Secretary of the Interior. The Principal Chief of the tribe without complaint signed deeds to the lots purchased on the basis of the appraisals.

The tribe itself had never complained that these appraisals were too low until this suit was filed. The tribe did complain that many lots had been wrongfully scheduled, but it has never asserted that they were undervalued. See the Act of the Creek Nation of October 12, 1904, and the memorial of October 19, 1906. (The Act authorized the commissions to make a schedule of the persons who had made permanent improvements on the lots and, therefore, who were entitled under the Act to purchase such lots at one-half of their appraised value.)

In pursuance of the above-mentioned Act of the Creek Nation, and of this memorial by the Creek Nation, Congress passed an Act (34 Stat. 137, 144) authorizing the bringing of suits for the benefit of the Creek Nation "for the collection of any moneys or recovery of any land claimed by any of said tribes." Two hundred thirty-one suits were filed, but all of them were filed for wrongful scheduling of the lots, and none on account of undervaluation thereof. So far as is known, the first complaint that has ever been registered for undervaluation of these lots by the townsite commissions was registered when this suit was instituted—thirty years after the appraisals were made.

Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either. It complains, first, that the townsite commissions for Muskogee and Wagoner appointed under the Creek Agreement adopted the appraisals made by them under the Curtis Act a year before; but the plaintiff does not show that values had increased in the meantime. It cites several instances where the appraisals by the townsite commissions were considerably below the assessments for taxation a year or so later; but it does not show that values were the same. It points to instances where the vacant lots were sold at auction a year or so later for sums more than twice the amount of the appraisals; but again it

does not show that values had not increased. The same is true of reports of estimates of values by the school superintendent as compared with the appraisals.

This is the extent of plaintiff's proof to show fraud or gross mistake. It is practically all inadmissible, since there is no showing that conditions were the same.

Although there is a large disparity in some of the figures, yet it must be remembered that prior to the time the townsite commissions made their valuations there had been no market for the lots, because the lots could not be sold. It was an extremely difficult thing for anyone to say just what these lots would bring when they were put on the market. At the time the appraisals were made no improvements had been made in any of the towns. The Indian Inspector for the Five Civilized Tribes stated in his testimony that none of them had been incorporated, none had any water or sewers, or street pavements, or sidewalks, or any modern conveniences; that the streets in the dry season were very dusty, and in the wet season were practically impassible. These lots were assessed for taxation by the town authorities apparently after incorporation, and, for all that appears, after improvements had been made or were in prospect. The assessments for tax purposes apparently included not only the value of the lots, but the improvements thereon. The appraisals of the townsite commissions related only to the value of the land.

The proof shows that oil was discovered in the vicinity of some of the towns, at any rate, in the interim between the appraisals by the townsite commissions and the assessment for taxation.

The record indicates that the appraisals were low, but we are by no means convinced that they were fraudulent, or that such gross mistake was made as to justify us in setting aside the appraisals made, and to undertake now, forty years later, to determine what the true values were. If there had been fraud or gross mistake, complaint thereof would have been made long before, as was

done in the matter of scheduling. Mere disparity between appraisal and subsequent sale price does not show fraud or gross mistake. Appraisals are made by sworn officers and are accepted as prima facie correct. To overcome such appraisals, clear and convincing evidence of fraud or gross mistake must be shown. As stated, the record fails to disclose that any event had happened which might have changed values. Often appraisals are higher than subsequent sale prices. The reverse is also true. Fraud cannot be assumed. It must be proved by clear and convincing evidence. There is no such evidence in the record.

Moreover, the proof offered is wholly insufficient to enable us to fix the true values of these lots at the time of the appraisals, even if we were convinced that fraud had been practiced or gross mistake had been made.

We are of the opinion that the plaintiff is not entitled to recover. Its petition, therefore, will be dismissed. It is so ordered.

MADDEN, *Judge*; JONES, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

APPENDIX G

168 Ct. Cl. 483

THE CREEK NATION

v.

THE UNITED STATES

[Appeal No. 9-63. Decided December 11, 1964]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian claims; appeal from Indian Claims Commission; judgments; res judicata; collateral estoppel.—The Creek Nation appeals from the decision of the Indian Claims Commission (February 28, 1963, 12 Ind. Cls. Comm. 54, Docket No. 167) granting appellee's motion for summary judgment on the ground that the suit was barred by the doctrine of res judicata since the questions presented had been put in issue and decided on the merits by the Court of Claims in *The Creek Nation* v. *United States* 93 Ct. Cl. 561 (1941). In the present suit the appellant seeks to recover the value of 1,198.99 acres of former Creek lands which, because of an erroneous Government survey in 1888, were included in an 1889 cession to the United States under an agreement which contained, among other things, a general release. Appellant asserts a claim which would result if the 1889 agreement (25 Stat. 757) were revised on the ground of mutual mistake, and also a claim based upon fair and honorable dealings under Section 2, Clause 5 of the Indian Claims Commission

Act. In the earlier suit the Indians had sought just compensation for the land claimed to have been taken as the result of the erroneous survey in 1881 and the Court of Claims dismissed the suit on the grounds that the language of the agreement showed that the Indians intended to cede the land in question since it was not then being occupied by the Creek Nation as a home, and because of the general release contained in the agreement. It is *held:* (1) that the claims asserted in the present suit could not have been considered under the special jurisdictional act authorizing the prior suit and therefore the doctrine of res judicata does not apply; (2) that while the doctrine of collateral estoppel might be applicable, it is not in this case since the questions and issues necessary to a determination of the instant case were not decided in the prior litigation, i.e., what the parties would have intended regarding the land in question if they had known of the erroneous 1881 survey, and whether or not the appellant has a claim based upon fair and honorable dealings. The decision granting appellee's motion for summary judgment is reversed and the case remanded to the Commission for further proceedings.

Judgments; res judicata; generally.—The doctrine of res judicata requires that parties and their privies be barred by a final judgment from relitigating in a subsequent lawsuit on the same cause of action all those issues which actually were or which could have been but were not decided in the prior lawsuit.

Judgment 713(2)

Judgments; collateral estoppel; generally.—The doctrine of collateral estoppel is an outgrowth of the doctrine of res judicata and comes into play where there is a second lawsuit between the same parties on a different claim or demand. In such a case the judgment in the prior litigation will operate as an es-

toppel only as to matters in issue or points actually controverted, upon the determination of which the finding or verdict was rendered. There is no bar as to facts or issues which might have been but were not litigated in the prior suit.

Judgment 731

Indian claims; judgments; res judicata; Indian Claims Commission Act claims; generally.—Since the Indian Claims Commission Act created new causes of action not usually, if ever, cognizable by the court under the prior special jurisdictional acts, the doctrine of res judicata will seldom apply where a suit under the new act is one which involves claims or demands which could not have been considered by the court under a special jurisdictional act involving the same tribe and the same transaction.

Judgment 589(1), 739

Indian claims; judgments; collateral estoppel; Indian Claims Commission Act claims; generally.—While claims asserted under the new and unusual jurisdiction of the Indian Claims Commission Act will seldom be barred under the doctrine of res judicata even though the same tribes may have sued the United States on claims arising under the same treaties, because the special jurisdictional acts under which the earlier suits were brought did not consent to suit in the types of claims permitted by the Indian Claims Commission Act, the doctrine of collateral estoppel may be applicable as a bar in suits brought under the Indian Claims Commission Act. Thus matters and issues actually controverted and decided in the earlier suit may be a bar to their adjudication in a suit under the new act, even though the cause of action be different.

Judgment 589(1)

Indian claims; judgments; collateral estoppel; Indian Claims Commission Act claims; fair and honorable dealings.—In claims brought under Clause 5 of Section 2 of the Indian Claims Commission Act, based on fair and honorable dealings, the Indian claimants could not have had such claims heard under earlier special jurisdictional acts in the absence of specific language authorizing such claims. In such cases certain facts [bearing on the issue of fairness] may have been decided by the court under the special jurisdictional act but the findings in the earlier case cannot raise an estoppel as to any issue not litigated. Thus a conclusive finding in the earlier case regarding the intent of the Indians in executing an agreement may not necessarily answer the question of fairness in a later case under the 1946 Act claiming that the Government's dealings with the Indians in connection with the same agreement were less than fair and honorable.

Judgment 739

Paul M. Niebell for appellant.

Aaron Shannon Bennett, with whom was *Assistant Attorney General Ramsey Clark* for appellee.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

This is an appeal from a decision of the Indian Claims Commission granting appellee's motion for summary judgment on the ground that appellant's claim was res

judicata, having been decided by this court in *The Creek Nation* v. *United States*, 93 Ct. Cl. 561 (1941).[1] Commissioner Scott dissented.

Appellant brought its suit before the Commission to recover the value of 1,198.99 acres of former Creek lands erroneously included in lands surveyed for the Seminole Tribe by appellee's surveyor Hackbusch in 1888. Under Section 2, Clauses 3 and 5 of the Indian Claims Commission Act of 1946 (60 Stat. 1049), appellant seeks revision of an agreement between the Creeks and the United States.

In 1866, the United States Government, by treaty, obtained the western half of the Creek Nation's domain in Oklahoma, and granted portions of this land west of the "Creek dividing line" to the Seminole Nation. When a survey of this "Creek dividing line" was finally made by the Government in 1871, it was discovered that the Seminoles had settled far to the east of this line on part of the Creek territory. In attempting to rectify this error, the Government entered into a treaty with the Creek Nation in 1881, whereby the United States purchased from the Creeks an additional 175,000 acres immediately east of the line as surveyed in 1871 for $175,000. When a survey was run in 1888 to establish the new eastern boundary, the Government surveyor Hackbusch included 176,198.99 acres instead of 175,000 in the new tract. All of this land, including the additional acreage, was allotted and patented to the Seminoles.

In 1889, the United States and the Creek Nation entered into an agreement, ratified by the Congress on March 1, 1889 (25 Stat. 757), which contained the following language:

> 1. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereinafter mentioned, hereby absolutely cedes and grants to the

[1] 12 Ind. Cls. Comm. 54 (1963).

United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description or in to any and all land and territory whatever; except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division; surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

II. In consideration whereof, and of the covenant herein otherwise contained, the United States agree to pay to the said Muscogee (or Creek) Nation the sum of two million two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents,

* * *

The error in the Hackbusch survey of 1888 was not discovered until sometime in 1930.

The Creeks sued the United States in 1937, under the jurisdictional act of May 24, 1924 (43 Stat. 139, as amended, 50 Stat. 650 (1937)), asking just compensation for the 1,198.99 acres of land which were taken as a result of the erroneous survey of 1888. This court, under that jurisdictional act, denied recovery on the ground that the Creek Nation intended under the 1889 agreement to grant to the United States the title to all the land as surveyed and which was not a part of the Creek homeland, even though it later developed that the tract contained more acres than that contemplated by the 1881 agreement. The court found that none of the 1,198.99 acres was occupied as a part of the Creek homeland.

The sole question of our decision is whether summary judgment for appellee was proper under the circumstances of this case. The defense of res judicata may properly be presented in a motion for summary judgment and the Indian Claims Commission has jurisdiction to grant

such a motion. *Choctaw Nation* v. *United States*, 128 Ct. Cl. 195, 121 F. Supp. 206 (1954). However, appellant contends that res judicata does not apply and that the decision of the Commission was in error, because the prior claim was presented under the limited scope of the 1924 jurisdictional act, whereas new causes of action are presented in the instant claim under the more liberal terms of the Indian Claims Commission Act of 1946.

We have concluded that appellant's contention must be sustained for two major reasons. First, the doctrine of res judicata in its strict sense is not involved here.

Second, although the defense of collateral estoppel is involved, compelling reasons exist for holding that it is not a bar to appellant's action under the circumstances.[2]

The leading case distinguishing collateral estoppel from res judicata, *Commissioner* v. *Sunnen*, 333 U.S. 586 (1948) teaches that res judicata applies when the

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[2] Collateral estoppel is technically part of res judicata. As explained in *Commissioner* v. *Sunnen*, 333 U.S. 586 (1948), "* * * where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' [Citations omitted]. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." See also *Max Bander* v. *United States*, 161 Ct. Cl. 475 (1964). As we shall subsequently point out, it is important to recognize the two doctrines as distinct and separable. This distinction has not been preserved in some of our former opinions, even though correct results may have been reached. We take this opportunity to set the matter straight.

same cause of action is urged the second time. The judgment in the prior case binds the parties and their privies and "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *Commissioner* v. *Sunnen, supra,* at 597.

However, when the cause of action upon which the second suit is brought is one which could not have been entertained in the prior suit, res judicata has no force and effect. *The Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359 (1955). This court has many times noted that the Congress created new causes of action in the Indian Claims Commission Act, which recognized liability in the United States where none had existed before.[3] "In fact, the act clearly creates causes of action and permits suits thereon which would not have been possible, and are not possible as far as we know, between private individuals." *Otoe and Missouri Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265 (1955), *cert. denied*, 350 U.S. 848 (1955). To be specific, the Indian Claims Commission Act, Section 2, Clauses 3 and 5 (60 Stat. 1049), permits recovery as follows:

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[3] *United States* v. *Seminole Nation*, 146 Ct. Cl. 171, 173 F. Supp. 784 (1959); in *Otoe and Missouri Tribe of Indians* v. *United States*, 131 Ct. Cl. 593 (1955), *cert. denied*, 350 U.S. 848, where this court discussed at some length the history of the Indian Claims Commission Act, it was said at page 602:

"The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimants apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealing between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in preexisting statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress." See also *Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359 (1955); *Western (Old Settler) Cherokee Indians* v. *United States*, 114 Ct. Cl. 716 (1949).

> * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

Recovery under the 1924 jurisdictional act, containing language typical of special statutes, was not so broad. It gave authority to this court to hear and adjudicate "all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe * * *" (43 Stat. 139).

Thus the Indian Claims Commission Act has done two things with regard to causes of action. First, it permits *revision* of treaties and agreements, whereas the court under the special acts was restricted to a construction or interpretation of the treaty or agreement to the extent that the interpretation was not inconsistent or in conflict with the terms of the treaty or agreement. Second, the act permits consideration of Indian claims under the broad scope of "fair and honorable dealings," a latitude again which the court lacked prior to passage of the act. *Choctaw Nation* v. *United States*, 318 U.S. 423 (1942).

When a claim is presented under either clause 3 or 5, section 2 of the act, and the defense of res judicata is interposed by the Government, the Indian Claims Commission must compare the pleadings in the case with the prior decision and its jurisdictional act. Disregarding for the moment the question of identity of facts or issues, if it appears that the claim presented is one which could not have been reached by the court in the prior case, res judicata does not apply. This is so even though recovery could have been had for the Indians on some theory cog-

nizable by the court at that time. *Commissioner* v. *Sunnen, supra.* As a practical matter, this means that few, if any, claims asserted under new causes of action created by the Indian Claims Commission Act can be barred by res judicata.

As we said in *The Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359, 363 (1955):

> If we are to give effect to the purposes of the Indian Claims Commission Act, we cannot hold that a former decision finally adjudicated and barred causes of action which were not in existence when the prior decision was made.

This does not mean that the Commission must hear every claim brought under the act. It only means that the new causes of action should be recognized as the Congress intended them to be, and that the Commission should look beyond the pleadings to see whether the Indians have had their day in court on the specific issues and factual presentations urged in the second suit.[4] It is at this point that the more flexible doctrine of collateral estoppel comes into consideration. In *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876), this doctrine is explained as follows:

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action,

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[4] In addition to the pleadings, the Commission may consider any depositions and admissions on file, plus affidavits accompanying a motion for summary judgment. The Commission may also use its pretrial procedure, 25 CFR § 503-22(e). Cf., Ct. Cl. Rules 43 and 44 (1964 Ed.).

> the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

Furthermore, "a subsequent modification in the significant facts or a change or development in the controlling legal principles may make [the prior] determination obsolete or erroneous, at least for future purposes." *Commissioner* v. *Sunnen, supra*, at 599. This statement recognizes the fact that collateral estoppel is a judicially made doctrine that was developed in furtherance of a public policy against repetitious litigation. *Hooper* v. *United States*, 164 Ct. Cl. 151, 326 F. 2d 982, 985 (1964), *cert. denied*, 377 U.S. 977 (1964), citing *Commissioner* v. *Sunnen, supra*, and *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522 (1931). "It is not meant to create vested rights in decisions that have become obsolete or erroneous with time * * *." *Commissioner* v. *Sunnen, supra*, at 599.

Has the Indian Claims Commission Act so changed "the legal atmosphere as to render the rule of collateral estoppel inapplicable" *id.* at 600? We think that to a certain extent, and under certain circumstances, it has so changed the legal climate.

It is true that under the law prior to the act treaties with the Indians were to be construed more liberally than private agreements and, "so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Choctaw Nation* v. *United States*, 318 U.S. 423 (1942). "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Id.* at 432. In the *Choctaw* case, the Supreme Court reversed this court's reliance on the liberal rules

of construction in agreements between the United States and the Indians, where such reliance led this court to interpret a treaty to render it a fairer agreement and more nearly in accord with the subjective intentions of the representatives of the Indians. Subsequent to passage of the Indian Claims Commission Act, we reversed the Commission's grant of appellee's motion for summary judgment. The Commission had concluded that the *Choctaw* case was res judicata in an action brought by the Indians under the unilateral mistake provisions of clause 3, section 2 of the act, and under the "fair and honorable dealing" provisions of clause 5. *The Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359.

The same set of circumstances occurred in earlier litigation over the meaning of a treaty in the case of *United States* v. *Choctaw and Chickasaw Nation*, 179 U.S. 494 (1900). The Supreme Court recognized that agreements with the Indians were to be interpreted in the sense in which they would naturally be understood by the Indians but reversed this court's judgment, 34 Ct. Cl. 17, saying at 179 U.S., pages 532-533:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing.

The court further said at page 535:

> * * * It is thus clear that the Court of Claims was without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties. Those rules, it is true, permit the relations between Indians and the United States to be taken into consideration. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine.

At the heart of the Indian Claims Commission Act is a recognition by the legislative branch of the Government that the special acts and existing facilities for adjudicating the claims of the Indians did not, in many instances, give the Indians a fair deal in their relations with the United States Government. The Congress acknowledged the moral obligation this Nation owes to its Indian *quasi* wards. These conclusions are evident in the legislative history of the act from its first inception as H.R. 7963, 71st Cong., 1st Sess. (1930) to the statement by the President in signing H.R. 4497, August 13, 1946. It was emphasized in the hearings on the bill that

this court had dismissed many Indian claims on purely legal grounds, since the special jurisdictional acts did not give this court the right to adjudicate the claims on the basis of moral obligations.[5]

The very act of creating a special tribunal as the Indian Claims Commission, rather than granting increased jurisdiction to the courts, in itself, reflects a change in the legal climate. Furthermore, the grant of authority to the Commission to determine whether the United States had, in its treaties and agreements with the Indian Tribes, violated the principles of fair dealings, and, where this appears, to revise and correct these treaties and agreements, certainly constitutes a change in the manner in which Indian claims are to be viewed.

It is argued that the Congress fully intended to reserve to the United States all defenses to a claim by the Indians (except laches and statute of limitations), including res judicata, and, inferentially, collateral estoppel.[6] This is true, but the reservation of such defenses must be considered in connection with the basic purpose and meaning of the Indian Claims Commission Act; emphasis on the reserved defenses should not defeat that basic purpose. Inherent in the defenses of res judicata and collateral estoppel are the limitations which preclude their applicability under certain circumstances in suits brought under the Indian Claims Commission Act. When Congress reserved these defenses, it also reserved considerations of their inapplicability. The subject of these defenses was much discussed by the Congress and others participating in writing the act. It is clear that one

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[5] See the statement of Ernest L. Wilkinson, February 14, 1940, before the Senate Subcommittee of the Committee on the Judiciary on S. 3083, 76th Cong. 3d Sess. (1940), and the exhibit charts placed in the record.

[6] Section 5 of the Indian Claims Commission Act reads as follows: "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

thing, and one thing only, was contemplated by the reservation in section 5: no issue should be heard again on its merits where a court has, in a prior suit, heard and considered all of the facts relating to that issue and has made a specific and definitive finding thereon. A fact once litigated and found is binding on the parties in a subsequent suit for revision of a treaty or agreement under the act. At times, this may mean that the whole cause of action fails because of the existence of such a finding; at other times it may mean that only a part of the claim is settled.

In claims brought under clause 5, based on "fair and honorable dealing," the situation is different from that in which the Indians ask for a revision of a treaty or agreement under clause 3. Since, under the *Choctaw* case, 318 U.S. 423, and *Choctaw and Chickasaw Nation*, 179 U.S. 494, the Indians could not have had their claims heard from the viewpoint of fair and honorable dealings, absent specific language in the jurisdictional act permitting this, the issue of such fairness could not have been considered by the courts prior to passage of the Indian Claims Commission Act. Although certain facts may have been decided by the court, the findings cannot raise an estoppel as to an issue not litigated. For example, a conclusive finding by the court in the former case as to the intent of the Indians in executing the agreement does not necessarily answer the question of fairness in the present case. Even if it be conceded that the Indians intended to convey the land in question, the act commands the Commission to examine all of the facts presented to determine whether, in the broad moral sense, the conduct of the Government in its dealings with the Indians was fair and honorable.

The Commission should make a preliminary determination as to whether a plea of unfair and dishonorable dealings raises a new and substantial issue that was not or could not be decided in prior litigation. Where

the facts found in the prior litigation show on their face that the dealings were fair and honorable under the circumstances and no new and substantial factual question on the issue is raised, the Commission can, of course, entertain a motion for summary judgment on behalf of the Government. See the companion case decided today, Appeal No. 10-63, *The Creek Nation* v. *United States post*, p. 512. There are also cases in which the claim based on fair and honorable dealings was recognized by a rule of law or equity in prior litigation; in such cases, clause 5 has no application. *Blackfeet and Gros Ventre Tribes* v. *United States*, 127 Ct. Cl. 807, 818 (1954), *cert. denied*, 348 U.S. 835 (1954). In other instances, the act requires the Commission to hear the Indians' claim of unfair and dishonorable dealings on the merits. Unless this be done, there is a failure to fulfill the objective of the act to give the Indians a full day in court on all issues not adjudicated by a competent body.

We believe that our conclusion in this regard is supported by the legislative history.[7] Especially noteworthy is the statement made by Mr. Frank Chambers, a Department of Justice attorney, in response to questions from the Senate Committee on Indian Affairs regarding the Department's suggested amendment giving section 5 its present wording, *supra*, note 6.

> THE CHAIRMAN. Let me ask you, Mr. Chambers: I understand you to say that this language in lines 13 and 14, "but all other defenses shall be available

[7] See, e.g., Memorandum by the Assistant Solicitor, Department of the Interior, on amendments to H.R. 4497 (which passed in its amended form) proposed by the Department of Justice, April 22, 1946; testimony of Frank Chambers, attorney, Department of Justice, before the Senate Committee on Indian Affairs, July 13, 1946, on H.R. 4497, 79th Cong., 2d Sess. (1946); Supplemental Statement of House Managers on Indian Claims Commission Bill, 92 Cong. Rec. App. A 4923-4924 (August 12, 1946); Conference Report of July 27, 1946, on H.R. 4497, H. Rep. No. 2693, 79th Cong., 2d Sess., p. 6; Sen. Rep. No. 1715, 79th Cong., 2d Sess., p. 6 (July 15, 1946).

to the United States," was not intended to set up a legal defense against an equitable claim.

MR. CHAMBERS. Against a moral claim. I would like to distinguish between equitable and moral, because of the possibility that "equitable" might relate to a claim in equity, say, under the Constitution; but against a moral claim my idea is that no legal defense would be good.

THE CHAIRMAN. So that no legal defense would be recognized against a claim based upon fair and honorable dealings that are not recognized by any existing rule of of law or equity?

MR. CHAMBERS. That is correct.

In this case, the Creeks have not had their day in court on the question of intention with regard to the 1,198.99 acres of land in dispute. All this court decided in the prior case, 93 Ct. Cl. 561, was the intention of the parties as evidenced by the specific language of the agreement. The court did not decide the subjective intention of the Indians and the Government in light of the error in the survey. Since the court could not revise the agreement to reflect the intention of the parties, the court was compelled to give effect to the Government's legal defense based upon the release contained in the agreement. Any other construction of the agreement would have run afoul of the terms of the agreement and the Supreme Court cases cited *supra*. The court did find that "For these 1,198.99 acres the plaintiff has not been compensated," 93 Ct. Cl. at 568; that the survey included "1,198.99 acres more than the defendant has paid for," *id.* at 569; and that "it is true that the parties in executing this treaty acted under a mutual misapprehension of fact as to the proper location of the eastern boundary of the tract, but not as to the lands actually occupied by the Creeks," *id.* at 571.

Our decision to return the case to the Commission for a hearing on the merits is buttressed by a decision of

the Commission in which it considered the 1889 agreement, *supra*, and held that the subjective intention of the Indians was contrary to the express wording of the release. *The Creek Nation* v. *United States*, 2 Ind. Cls. Comm. 66 (1952). There the Commission specifically found that the consideration recited in the 1889 agreement went only to those lands in the Indian Territory conditionally ceded to the United States under the treaty of 1866, *supra*, and that "no part of the above consideration was paid or intended to be paid for the general release set forth in paragraph I of said Agreement of 1889 * * *". 2 Ind. Cls. Comm. at 97. We are unable to agree that the ruling "relative to the intent of the parties to the 1889 agreement was not necessary to the decision in that case and, therefore, not controlling here." 12 Ind. Cls. Comm. 54, 83 (1963). In the absence of the finding made in the 1952 case, it is difficult to see how the Commission could have reached its decision for the Indians (2 Ind. Cls. Comm. 66). Nor did this court's decision reported in 93 Ct. Cl. 561 operate to invalidate the ruling made subsequently by the Commission under the provisions of the Indian Claims Commission Act, for the very reason that we find our 1941 decision in this case is not controlling today.

Appellee has urged that this case is controlled by our prior decisions in *Choctaw Nation* v. *United States*, 128 Ct. Cl. 195, 121 F. Supp. 206 (1954); *Blackfeet and Gros Ventre Tribe* v. *United States*, 127 Ct. Cl. 807, 119 F. Supp. 161 (1954), *cert. denied*, 348 U.S. 835 (1954); and *Western (Old Settler) Cherokee Indians* v. *United States*, 116 Ct. Cl. 665, 89 F. Supp. 1006 (1950), *cert. denied*, 340 U.S. 903 (1950). In each of those cases (filed under the Indian Claims Commission Act), we upheld the Commission's dismissal on the grounds that the doctrine of res judicata was applicable. Without reciting the details of each case, it is sufficient to note that in each the facts and issues presented were the same facts and issues that had been decided in prior

cases. We acknowledge that this court was not as precise as it should have been in those cases, for in each the principles of collateral estoppel were involved and applied, even though it was called res judicata. With respect to our decisions sustaining the Commission's holding on res judicata in *Choctaw Nation* v. *United States*, 133 Ct. Cl. 207 (1956), *cert. denied*, 352 U.S. 825 (1956) and *Seminole Nation* v. *United States*, 125 Ct. Cl. 375 (1953), we simply point out that in those cases the Supreme Court had in the prior cases considered and determined the question and issues; also, this court found that there was in fact no unfair or dishonorable dealing on the part of the Government.

For the reasons set forth above, we think the Indian Claims Commision Act contemplated a hearing on the claim, either under section 2, clause 3, which permits revision of the agreement because of mutual or unilateral mistake, or under clause 5, which permits revision on grounds of fair and honorable dealing, or both. Therefore, the decision granting appellee's motion for summary judgment is reversed and the cause is remanded to the Commission for further proceedings not inconsistent with this opinion.

Reversed and Remanded